

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

RICARDO FALCON, #1321056,)	
Petitioner,)	
)	
v.)	3:06-CV-2331-L
)	ECF
NATHANIEL QUARTERMAN, Director,)	
Texas Department of Criminal Justice,)	
Correctional Institutions Division,)	
Respondent.)	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Pursuant to the provisions of 28 U.S.C. § 636(b), and an order of the District Court in implementation thereof, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a *pro se* petition for habeas corpus relief brought by a state prisoner pursuant to 28 U.S.C. § 2254.¹

Parties: Petitioner is currently confined within the Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ-CID). Respondent is the Director of TDCJ-CID. The Court did not issue process to Respondent pending preliminary screening.

Statement of the Case: Petitioner pleaded guilty to three robbery offenses and true to one enhancement paragraph in the 292nd Judicial District Court of Dallas County, Texas, in cause

¹ Petitioner initially filed this action in the San Angelo Division, which in turn transferred it to this Court in the Dallas Division. Petitioner subsequently paid the \$5 filing fee as directed by this Court.

numbers F04-53106, F04-53108, F04-53109. Punishment was assessed at thirty years imprisonment. (Petition (Pet.) at 2). The court of appeals dismissed his direct appeals for want of jurisdiction because the notices of appeal were untimely filed. *See Falcon v. State*, No. 05-05-01184-CR, 05-05-01185-CR, and 05-05-01186-CR (Tex. App. – Dallas Aug. 18, 2005, no pet.), <http://www.courtstuff.com/FILES/05/05/05051184.HTM>. While Petitioner was granted an extension until about March 2, 2006, to file a petition for discretionary review, he failed to do so. *Id.*

Thereafter, Petitioner filed this federal petition on December 13, 2006.²

Findings and Conclusions: This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which provides in pertinent part that a state prisoner must exhaust all available state court remedies before a federal court will consider the merits of his claims. 28 U.S.C. § 2254(b) and (c) (West 2007); *Rhines v. Weber*, 544 U.S. 269, 274 (2005). The exhaustion requirement is designed to "protect the state court's role in the enforcement of federal law and prevent the disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *see also Rhines*, 544 U.S. at 274. Exhaustion of state court remedies "is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Morris v. Dretke*, 379 F.3d 199, 204 (5th Cir. 2004) (quoting *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999)). A Texas prisoner may satisfy that requirement by presenting

² Pursuant to *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998), a federal petition is deemed filed for determining application of the AEDPA when the prisoner tenders it to prison officials for mailing. Here Petitioner failed to sign the petition on the designated line on page 9 of the federal petition. He did, however, print his name and list his address in the section labeled "Petitioner's current address." (Pet. at 9). Therefore, absent additional information, the Court is bound by the filing date of December 13, 2006.

both the factual and legal substance of his claims to the Texas Court of Criminal Appeals in a petition for discretionary review or in an application for a state writ of habeas corpus pursuant to Tex. Code Crim. Proc. art. 11.07. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998); *Bautista v. McCotter*, 793 F.2d 109, 110 (5th Cir. 1986); *Richardson v. Procnier*, 762 F.2d 429, 430-32 (5th Cir. 1985).

A review of the petition reflects that Petitioner has not satisfied the exhaustion requirement. It appears that he filed neither a petition for discretionary review nor an art. 11.07 application. The Texas Court of Criminal Appeals has, thus, not had an opportunity to consider the merits of Petitioner's claims. Accordingly, the petition for a writ of habeas corpus should be dismissed without prejudice for failure to exhaust state court remedies.³

³ The Court has reviewed the on-line records of the Dallas County District Court and the Texas Court of Criminal Appeals to confirm that Petitioner filed neither a petition for discretionary review nor an art. 11.07 application with respect to the convictions at issue in this case.

RECOMMENDATION:

For the foregoing reasons, it is recommended that the petition for a writ of habeas corpus be dismissed without prejudice for failure to exhaust state court remedies, see 28 U.S.C. § 2254(b) and (c).⁴

A copy of this recommendation shall be mailed to Petitioner.

Signed this 24th day of January, 2007.



WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a *de novo* determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

⁴ The Court cautions Petitioner that the 1996 amendment to the habeas corpus statute imposes a one-year statute of limitations for filing habeas corpus petitions in federal court, *see* 28 U.S.C. § 2244(d), and that this provision is applicable to this and any subsequent petition that Petitioner may file in this court. Thus, Petitioner should act diligently and expediently in seeking habeas corpus relief in both state and federal court.